

**5ORDER SHEET**  
THE HIGH COURT OF SINDH, KARACHI  
RA. No. 34 of 2022

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Dated: Order with signature of Judge(s)

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1. For orders on Office Objection as at "A".
2. For hearing of CMA NO. 1438 of 2022
3. For hearing of Main Case.

Date of Hearing : 26 April 2023 and 27 April 2023

Petitioner : Abdul Matten through  
Mazhar Ali Dehraj, Advocate

Respondents : Syed Asim Nisar through Muhammad  
Sohail Hasan

**ORDER**

**MOHAMMAD ABDUR RAHMAN, J.**, This application has been maintained by the Applicant under Section 115 of the Code of Civil Procedure, 1908 praying that this Court revise the Judgement dated 25 November 2021 and Decree dated 27 November 2021 passed by the IX<sup>th</sup> Additional District Judge Karachi (East) in Civil Appeal No.135 of 2020 which upheld the Order dated 7 September 2020 passed by the II<sup>nd</sup> Senior Civil Judge Karachi (East) rejecting the Plaint of Civil Suit No.1089 of 2019.

2. The Applicant was a tenant of the Respondent No.1 in respect of Flat No.C-4 FL-7, Khayaban-e-Asifa, Block-13-B Gulshan-e-Iqbal, Karachi admeasuring 1365 sq. feet (hereinafter referred to as the "Said Property"). Rent case No.436 of 2018 had been instituted by the Respondent as against the applicant before the II<sup>nd</sup> Rent Controller Karachi (East) and which was granted in favour of the Respondent. Against the order evicting the Appellant passed by the II<sup>nd</sup> Rent Controller Karachi (East) the

Appellant had preferred FRA 84 of 2019 before the VIIIth Additional District Karachi (East) and which had also been dismissed.

3. During the pendency of Rent Case No. 436 of 2018, the Appellant instituted Civil Suit No.1089 of 2019 before the II<sup>nd</sup> Senior Civil Judge Karachi (East) seeking specific performance on an oral agreement to purchase the Said Property for a total sale consideration of Rs.5,500,00 (Rupees Five Million Five Hundred Thousand). The Appellant alleges that he has paid the entire sale consideration to the Respondent and thereafter was on **6 May 2019** compelled to institute Civil Suit No.1089 of 2019 before the II<sup>nd</sup> Senior Civil Judge Karachi (East) seeking specific performance on the oral agreement.

4. It seems that the Respondent through his advocate had on 12 May 2018 had sent a legal notice stating therein as under:

“ ... On behalf of our client Syed Asim Nisar, the owner of property i.e. C-4, F-7, Block-13-B, Khasaban-e-Asifa, Gulshan-e-Iqbal, Karachi (hereafter: "the said property") we hereby out you on legal notice as follows:-

1. Vide rent agreement dated 21.10.3009 you were inducted as tenant in the afore-mentioned property by our client on a monthly rent of Rs.14.000/- . It was agreed that every year the rent would increase as per the operative rent in the market.
2. Sometime in January 2011 you had orally agreed with our client to buy the said property. in which the terms and conditions were clarified in various meetings and telephonic conversations, as follows:
  - a) if you were to make immediate full and final payment of Rs.5.5 million in January 2011 the latter would be the sale consideration:
  - b) however, if you would not be in a position to make the full payment in January 2011, any payments made by you in January 2011 or thereafter would be adjustable with the accruing, rent including escalation in rent, and the sale agreement and consideration of the said property would have to be re-negotiated afresh as per the then prevalent market price/ value of the said property:

- c) the above would clearly show that the discussion in order to sell the said property by our client to your goodself was contingent upon the above conditions. Therefore, in 2011 no agreement to sell the property was finalized, as the contingencies attached and discussed aforesaid were never fulfilled:
- d) admittedly, you did not make the full payment of Rs.5.5 million in January 2011 and, therefore, the agreement to sell in relation to the said property was not finalized.

3. As is stand today, from January 2011 till date the rent which is accrued on you, including the escalation of rent as stated in para 1 above is as follows:

Sr. No.	Period	Rent Due	Total
1	01-01-2011 to 31-12-2011	Rs.14,000x12	168,000
2	01-01-2012 to 31-12-2012	Rs.20,000x12	240,000
3	01-01-2013 to 31-12-2013	Rs.30,000x12	360,000
4	01-01-2014 to 31-12-2014	Rs.35,000x12	420,000
5	01-01-2015 to 31-12-2015	Rs.40,000x12	480,000
6	01-01-2016 to 31-12-2016	Rs.45,000x12	450,000
7	01-01-2017 to 31-12-2017	Rs.50,000x12	600,000
8	01-01-2018 to 31-5-2018	Rs.55,000x05	284,000
	<b>Total</b>		<b>3,083,000</b>

4. It is pointed out that as per the instructions given to us by our client, from January 2011 till date you have made a total payment of Rs.3,061,792/- towards rent, the breakup whereof is as follows:

Sr. No.	Date	Rent Due	Total
1	31.01.2011		14,000
2	28.02.2011		14,000
3	31.03.2011		14,000
4	30.04.2011		14,000
5	31.05.2011		14,000
6	30.06.2011		14,000
7	31.07.2011		14,000
8	31.08.2011		14,000
9	30.09.2011		14,000
10	31.10.2011		14,000
11	30.11.2011		14,000
12	31.12.2011		50,000
13	31.01.2012		
14	28.02.2012		
15	31.03.2012		
16	30.04.2012		120,000
17	21.08.2012		100,000
18	5.5.2016		50,000

19	1/1/2017		840,000
20	15/6/2017		473,220
21	31/08/2017		487,560
22	30/09/2017		320,000
23	30/10/2017		22,000
24	30/11/2017		201,016
25	31/12/2017		250,000
	<b>Total</b>		<b>3,061,796/-</b>

5. The above would show that you are in default of rent, which makes you liable for eviction.
6. On 1.1.2014 you had made a payment of Rs.27,30,000 stating to be an advance towards the sale of the said property with final price of the said property to be the prevalent market price, at the time of making the final payment.
7. Today the market price of the said property is Rs.15 million and if Rs 27,30,000/- is deducted there-from this would leave the balance payment to be at Rs.1,22,70,000/-. We give you 14 days notice to make the balance payment of Rs.1,22,70,000/-, failing which our client also gives you notice to intimate the details of your bank account so that the refund of Rs.27,00,000/- could be made to you immediately. In case you do not make the balance payment of Rs.1,22,70,000/- within 14 days and also do not come forward to collect Rs.27,30,000/- the latter amount shall stand forfeited without any further notice.
8. Also if you do not agree that the current market price of the said property is Rs.15 million, no agreement of sale could be construed because for any contract to take place, the parties must converge on the terms and conditions. Without prejudice to the latter, no agreement of sale could be construed to have ever taken place because of the terms being contingent. If you agree that the present market price of the said property is Rs.15 million and still do not make the balance payment of Rs.1,22,70,000/-, the sale agreement, if any, would stand cancelled without any further notice upon the expiry of 14 days from today.
9. Also we advise you to immediately vacate the said property, failing which we shall be left with no other option but to institute eviction proceedings against you, which shall be pursued at your own cost, risk and consequences, which you please note."

5. An application under Order VII Rule 11 of the Code of Civil Procedure, 1908 was maintained by the Respondent in Suit No. 1089 of 2019 before the IInd Senior Civil Judge Karachi (East) pleading that:

- (i) As no written agreement to sale has been entered into as between Appellant and the Respondent, the suit was not maintainable.

- (ii) That as the Appellant has stated in his plaint that the cause of action has accrued on 1 January 2014 therefore the suit having been presented on 25 April 2019 was barred under Article 113 of the First Schedule read with Section 3 of the Limitation Act.

6. The application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 was heard by the IIInd Senior Civil Judge Karachi (East), and who on 7 September 2020 rejected the Plaint of Civil Suit No.1089 of 2019 on the ground that:

- (i) as no reason was given in the plaint as to why written agreement was not executed as between the parties, specific performance on the agreement could not be ordered.
- (ii) That as full payment had been made as alleged by the Appellant on 1 January 2014 limitation to file the Suit should be calculated from that date and as it had been filed after a period of nearly five and a half years on 6 May, 2019 the suit was barred under Article 113 of the First Schedule read with Section 3 of the Limitation Act, 1908

7. Being aggrieved and dissatisfied by the Order dated 7 September 2020 passed in Civil Suit No.1089 of 2019 by the IIInd Senior Civil Judge Karachi (East) the Appellant had preferred Civil Appeal No.135 of 2020 before the IX<sup>th</sup> Additional District and Sessions Judge (MCAC) Karachi (East), and who by a Judgement dated 25 November 2021 held that:

- (i) It was incumbent on the Appellant to mention in the Plaint as to the terms and conditions of the sale

agreement and to mention the names of witnesses of the agreement failing which it failed to meet the requirements of an agreement on which specific performance could be ordered; and

- (i) While the Respondent admitted the oral agreement he states that payment of Rs.5,500,00/- was to be made by January 2011; and which should be the basis for determining the time from which the period of limitation would commence resulting in Suit No. 1089 of 2019 having been filed after a period of seven years rendering the Suit as being barred under the provisions of Article 113 of the First Schedule read with Section 3 of the Limitation Act 1908.

8. Mr. Mazhar Ali Dehraj, appeared on behalf the Applicant and stated that both the IX<sup>th</sup> Additional District Judge Karachi (East) in its Judgement 25 November 2021 and Decree dated 27 November 2021 passed in Civil Appeal No.135 of 2020 as well as the II<sup>nd</sup> Senior Civil Judge in its Order dated 7 September 2020 rejecting the plaint of Civil Suit No.1089 of 2019 had committed a material irregularity as on the hearing of an application under Order VII Rule 11 of the Code of Civil Procedure it is incumbent on the Court to treat the Plaint as true and a court can only reject the plaint, if the averments mentioned in the plaint, if accepted as true, did not entitle the plaintiff for relief. He relied on a decision of the Supreme Court of Pakistan reported as **Abdul Waheed vs. Mst. Ramzanu**<sup>1</sup> and a decision of the High

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<sup>1</sup> 2006 SCMR 489

Court of Peshawar reported as **Zahid Jamil Vs. Mst. Saeeda Bano**<sup>2</sup> which both advance such a proposition.

9. He contends that as the Respondent in his written statement admitted as to the existence of an oral Agreement to Sale the plaint could not have been rejected on the ground that a written agreement of sale was not executed as between the Appellant and Respondent as was held by the IInd Senior Civil Judge Karachi (East), in the order dated 7 September 2020 passed in Civil Suit No. 1089 of 2019. He further averred that the terms of the agreement had been broadly indicated in Civil Suit No.1089 of 2019 and he did not need to mention the names of witnesses in the plaint, keeping in mind that the broad terms of the oral agreement of sale had in fact been conceded to in the Written Statement and on which basis he impugns the Judgement dated 25 November 2021 and Decree dated 27 November 2021 passed by the IX<sup>th</sup> Additional District Judge Karachi (East) in Civil Appeal No.135 of 2020.

10. He further contended that the time from when the period of limitation is to be calculated is not solely base on a period of three years from the date of the agreement to sale have been entered into or from the date when the Appellant had performed his obligations under that agreement, rather under Article 113 of the First Schedule of the Limitation Act 1908 it is to be calculated from the date fixed for its performance and in the event that no such date was specifically agreed, then from the date when the Plaintiff would have notice of the refusal of the performance of the agreement by the Defendant. In this regard he referred to the legal notice dated 12 May 2018

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<sup>2</sup> 2011 MLD 693

issued by the Respondent to the Appellant and stated that in paragraph 7 of that legal notice, the Respondent had for the first time given an indication of the refusal to perform his obligations and the period from when limitation under Article 113 of the First Schedule of Limitation Act 1908 should be calculated should be the date of the refusal. He relied on a decision reported as **Jaiwanti Bai vs. Messrs. Amir Corporation**<sup>3</sup> where it was held that:

“ ... 28. To seek specific performance of agreement to sale, Article 113 of the Limitation Act provides two starting points to trigger the period of limitation of three years; one from ‘the date fixed for the performance, and second where ‘no such date is fixed, when the plaintiff has notice that performance is refused’.”

He also relied on three Judgements i.e. **Managing Director Suit Southern Gas Company Limited Karachi vs. Ghulam Abbas**<sup>4</sup> wherein it was stated that the issue of limitation should be looked at sympathetically by the courts and not technically and the decision of the case reported as **Irshad Ali vs. Sajjad Ali**<sup>5</sup> where it was stated that in a suit for rendition of accounts relating to a partnership that an issue of limitation would be a mixed question of facts and law and finally a decision of the Supreme Court reported as **Shoukat Ullah vs. Adil Tiwana**<sup>6</sup> wherein it was stated that even where a suit for specific performance was dismissed the sale consideration that was paid to the seller is liable to be returned by the seller to the buyer.

11. Conversely, Mr. Muhammad Sohail Hasan, for the Respondent has contended that there is no material irregularity in the Judgement dated 25 November 2021 of either the IXth Additional District & Sessions Judge (MCAC) Karachi (East) passed in Civil Appeal No.135 of 2020 or in the

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<sup>3</sup> PLD 2021 SC 434

<sup>4</sup> PLD 2003 SC 724

<sup>5</sup> PLD 1995 SC 629

<sup>6</sup> 2018 SCMR 769



order dated 7 September 2020 passed by the IInd Senior Civil Judge Karachi (East) in Civil Suit No.1089 of 2019. He stated that Civil Suit No.1089 of 2019 was instituted with mala fide intent and was done to frustrate the proceedings before the Rent Controller that had been instituted by the Respondent. He finally stated that the plaint had been correctly rejected as the time for the performance of the agreement of sale was in 2011 and Civil Suit No.1089 of 2019 having been presented on 6 May 2019 had been correctly rejected as being barred under Article 113 of the First Schedule read with Section 3 of the Limitation Act, 1908 by both those courts. Counsel for the Respondent relied on the decision of the Supreme Court of Pakistan reported as **Maulana Nur-Ul-Haq vs. Ibrahim Khalil**<sup>7</sup> and a decision of the High Court of Lahore reported as **Ghulam Muhammad And 8 Others Vs. Town Committee Piplan Through Assistant Commissioner /Administrator District Mianwali and 7 others**<sup>8</sup> to state that the plaint could be rejected under the provisions of Order 7 Rule 11 on the ground of having been filed after the time period provided for in Schedule 1 of the Limitation Act, 1908 having expired.

12. I have heard the counsel for the Appellant as well as the counsel for the Respondent and have perused the record. The Supreme Court of Pakistan has in the decision reported as **Haji Abdul Karim vs. Messrs Florida Builders (Private) Limited**<sup>9</sup> outlined the basis for deciding an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 wherein it was held that:<sup>10</sup>

“ ... 12. After considering the ratio decidendi in the above cases, and bearing in mind the importance of Order VII, Rule 11, we think it may be helpful to formulate the guidelines for the interpretation thereof so as to facilitate the task of courts in construing the same. Firstly, there can be little doubt that primacy, (but not necessarily

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<sup>7</sup> 2000 SCMR 1305

<sup>8</sup> 2003 MLD 1222

<sup>9</sup> PLD 2012 SC 247

<sup>10</sup> *Ibid* at pgs. 266-267

exclusivity) is to be given to the contents of the plaint. However, this does not mean that the court is obligated to accept each and every averment contained therein as being true. Indeed, the language of Order VII, Rule 11 contains no such provision that the plaint must be deemed to contain the whole truth and nothing but the truth. On the contrary, it leaves the power of the court, which is inherent in every court of justice and equity to decide whether or not a suit is barred by any law for the time being in force completely intact. The only requirement is that the court must examine the statements in the plaint prior to taking a decision

Secondly, it is also equally clear, by necessary inference, that the contents of the written statement are not to be examined and put in juxtaposition with the plaint in order to determine whether the averments of the plaint are correct or incorrect. In other words the court is not to decide whether the plaint is right or the written statement is right. That is an exercise which can only be carried out if a suit is to proceed in the normal course and after the recording of evidence. In Order VII, Rule 11 cases the question is not the credibility of the plaintiff versus the defendant. It is something completely different, namely, does the plaint appear to be barred by law.

Thirdly, and it is important to stress this point, in carrying out an analysis of the averments contained in the plaint the court is not denuded of its normal judicial power. It is not obligated to accept as correct any manifestly self-contradictory or wholly absurd statements. The court has been given wide powers under the relevant provisions of the Qanun-e-Shahadat. It has a judicial discretion and it is also entitled to make the presumptions set out, for example in Article 129 which enable it to presume the existence of certain facts. It follows from the above, therefore, that if an averment contained in the plaint is to be rejected, perhaps on the basis of the documents appended to the plaint, or the admitted documents, or the position which is beyond any doubt, this exercise has to be carried out not on the basis of the denials contained in the written statement which are not relevant, but in exercise of the judicial power of appraisal of the plaint.

13. If within the perimeters as set by the Supreme Court of Pakistan, one is to examine Civil Suit No.1089 of 2019, it is clear that the Appellant is seeking the specific performance of an agreement to purchase the Said Property which the Appellant states was agreed as between the Appellant and the Respondent in January 2014. I have no doubt that the rest of the pleadings in Civil Suit No. 1089 of 2019 put forward by the Appellant are ambiguous in as much as not all the terms of the Agreement have been spelt out e.g. by when the agreement has to be performed by or as to various obligations to pay dues prior to a competition, however this is not fatal to maintaining a suit for specific performance of an oral Agreement to

Sell. Clarity is given in Order VI Rule 12 of the Code of Civil Procedure, 1908 which states that:

“ ... 12. Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.”

It is clear that where a pleading as to the existence of an agreement are being pleaded from conversations, it is not necessary for the Plaintiff to spell out the entire contract in detail but rather it would be proper to make the general claim as to the contract which he is attempting to enforce. If the court finds the plaint to be ambiguous, it can ask for further and better particulars to have been filed by the Plaintiff under the provisions of order VI Rule 5 of the Code of Civil Procedure, 1908. It however cannot be the case that just because the terms of the agreement have not all been spelt out that the Agreement must be treated as unenforceable and must automatically be rejected under Order 7 Rule 11 of the Code of Civil Procedure, 1908. While I am willing to accept the contention that if the pleadings **did not identify an agreement that was enforceable** by a court the plaint could be rejected under Order 7 Rule 11 of the Code of Civil Procedure, 1908, this is however not the case over here. The Appellant has maintained in his Plaint that he had entered into an oral agreement with the Respondent and which fact the Respondent has not denied in his Written Statement, rather it has been specifically admitted that there was in fact an oral agreement as between the Appellant and the Respondent. While the terms of the agreement are in dispute, this to my mind would not amount to an agreement on which a decree for specific performance could not be maintained. I am careful to note that it has been held by the

Supreme Court of Pakistan in **Haji Abdul Karim vs. Messrs Florida Builders (Private) Limited**<sup>11</sup> that the contents of the Written Statement should not be examined by a court while deciding an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908. I am clear that the Supreme Court of Pakistan was in this regard referring to denials of fact made by the Defendant in the Written Statement and not admissions. Clearly, an admission made by the Defendant in a Written Statement would come within the purview of admitted evidence that, as held in **Haji Abdul Karim vs. Messrs Florida Builders (Private) Limited**,<sup>12</sup> could be examined by a court while determining an application under order VII Rule 11 of the Code of Civil Procedure, 1908.

14. Indeed, in nearly any case for specific performance either the terms of the obligations or the performance of the obligations under an agreement to sale are in dispute and which are left to be adjudicated in evidence. In appropriate circumstances, a court has even got the power to imply terms into a contract or where the terms are uncertain, but capable of being made certain, in accordance with Section 29 of the Contract Act, 1872 to enforce such contracts. Needless to say, if the term cannot be implied or are not capable of being made certain then specific performance would not be granted, however such facts must be the subject of evidence as between the parties to the *lis*.<sup>13</sup> However, to reject a plaint would in fact deny the Plaintiff such an opportunity all together and on which basis I believe that both II<sup>nd</sup> Senior Civil Judge Karachi (East) in Civil Suit No.1089 of 2019 and the IX<sup>th</sup> Additional District Judge Karachi (East) in Civil Appeal No.135

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<sup>11</sup> PLD 2012 SC 247

<sup>12</sup> *ibid*

<sup>13</sup> See **Mubashir Ahmed vs. Syed Muhammad Shah** 2011 SCMR 1109; **Muhammad Nawaz through LR vs. Haji Muhammad Baran Khan** 2013 SCMR 1300; **Mst Kubra Ahmed vs. Yasmeen Tariq** PLD 2019 SC 677; **Sadruddin vs. Sultan Khan** 2021 SCMR 642; **Muhammad Ghaffar (Deceased) vs. Arif Muhammad** 2023 SCMR 344;

of 2020 have erred in their findings on holding that the Appellant having failed to identify all the details of the Agreement would bar him from seeking specific performance of an oral agreement. As stated above, the Appellant under the provisions of Order VI Rule 12 of the Code of Civil Procedure, 1908 is not bound to make such disclosure in the Complaint and in the event that there was ambiguity, the court could, under Order VI Rule 5 of the Code of Civil Procedure, 1908, ask for further and better particulars to be provided by the Appellant. The oral agreement of sale being pleaded and also admitted in respect of the purchase of the Said Property must be taken as true and would be an agreement on which a *lis* for specific performance could be maintained.

15. The second ground which found favour with both the II<sup>nd</sup> Senior Civil Judge Karachi (East) in Civil Suit No.1089 of 2019 and the IX<sup>th</sup> Additional District Judge Karachi (East) in Civil Appeal No.135 of 2020 was that the suit was barred under Article 113 of the First schedule read with Section 3 of the Limitation Act, 1908 having been instituted after the period mentioned therein. The II<sup>nd</sup> Senior Civil Judge Karachi (East) in Civil Suit No.1089 of 2019 had considered that as performance had purportedly been completed by the Appellant of his obligation in January 2014 such a action, must necessitate the plaintiff to immediately file a suit to bring it within the purview of Article 113 of the First Schedule of Limitation Act or as held by the IX<sup>th</sup> Additional District & Sessions Judge (MCAC) Karachi (East) in Civil Appeal No.135 of 2020 however held that on the basis of the averments of the respondent in his written statement as the agreement of sale should have been performed in January 2011, Civil Suit No.1089 of 2019 having filed in 2019 was barred by seven years.

16. Article 113 of the First Schedule of the Limitation Act 1908 was also considered by the Supreme Court of Pakistan in the decision reported as **Haji Abdul Karim vs. Messrs Florida Builders (Private) Limited**<sup>14</sup> wherein it was held that:<sup>15</sup>

“ ... In the context of interpreting Article 113 of the Act, the provisions for the facility of reference are reproduced below:-

Description of Suit	Period of Limitation	Time from which Period begins to Run
For specific performance of a contract	Three Years	The date fixed for the performance, or, if no such date is fixed when the plaintiff has notice that performance is refused

And for the purpose of the above, it seems expedient to touch upon the legislative history of the Article. The prior Limitation Acts of 1871 and 1877, had in each of them the corresponding provision as in Article 113. However, the words in 1871 Act, were "when the plaintiff has notice that his right is denied", postulating that the second part of Article 113 was the only provision then regulating the limitation for the suits for specific performance and the commencement of three years period was dependent on the proof of the fact of notice of denial and the question of limitation was accordingly to be decided, having no nexus with the date even if fixed by the parties for the performance of the contract. The said provision however was expanded and these words were substituted in the subsequent Act of 1877, as are also found in the third column of the present Act. The change brought by the Legislature in 1877 Act was retained in Article 113 of the Act, by including the first part that the time would run from the '**date fixed**' for the performance is thus purposive and salutary in nature, which contemplates and reflects the clear intention of the legislature to prescribe the same (three years) period of limitation, however, providing that the parties who otherwise have a right to fix a date of their own choice in the agreement for the performance thereof, such date in consequence of law shall also govern the period of limitation as well for the suits falling in this category. Thus now the three years period mentioned in Column No. 3 of the Article runs in two parts:--

(i) from the date fixed for the performance; or

(ii) where no such date is fixed when the plaintiff has notice that performance is refused.

<sup>14</sup> PLD 2012 SC 247

<sup>15</sup> *Ibid* at pgs. 256-258

The reason for the said change as stated above is obvious. In the first part, the date is certain, it is fixed by the parties, being conscious and aware of the mandate of law i.e. Article 113, with the intention that the time for the specific performance suit should run therefrom. And so, the time shall run forthwith from that date, irrespective and notwithstanding there being a default, lapse or inability on part of either party to the contract to perform his/its obligation in relation thereto. The object and rationale of enforcing the first part is to exclude and eliminate the element of resolving the factual controversy which may arise in a case pertaining to the proof or otherwise of the notice of denial and the time thereof. In the second part, the date is not certain and so the date of refusal of the performance is the only basis for computation of time. These two parts of Article 113 are altogether independent and segregated in nature and are meant to cater two different sorts of specific performance claims, in relation to the limitation attracted to those. A case squarely falling within the ambit of the first part cannot be adjudged or considered on the touchstone of the second part, notwithstanding any set of facts mentioned in the plaint to bring the case within the purview of the later part. In other words, as has been held in the judgments reported as Siraj Din and others v. Mst. Khurshid Begum, and others (2007 SCMR 1792) and Ghulam Nabi and others v. Seth Muhammad Yaqub and others (PLD 1983 SC 344) "when the case falls within first clause the second clause is not to be resorted to". However, the exemption, the exclusion and the enlargement from/of the period of limitation in the cases of first part is permissible, but it is restricted only if there is a change in the date fixed by the parties or such date is dispensed with by them, but through an express agreement; by resorting to the novation of the agreement or through an acknowledgment within the purview of section 19 of the Act. And/or if the exemption etc. is provided and available under any other provision of the Act however, to claim such an exemption etc. grounds have to be clearly set out in the plaint in terms of Order VII Rule 6, C.P.C. We have examined the present case on the criteria laid down above, and find that according to the admitted agreement between the parties, 31-12-1997 was/is the 'date fixed' between them for the performance of the agreement, which has not been shown or even averred in the plaint to have been changed or dispensed with by the parties vide any subsequent express agreement. In this behalf, it may be pertinent to mention here that during the course of hearing Mr. Abdul Hafeez Pirzada, on a court query, has stated that there is no agreement in writing between the parties which would extend/dispense the date fixed and that he also is not pressing into service the rule of novation of the contract. We have also noticed that the petitioners have neither alleged any acknowledgment in terms of Article 19 of the Act, which should necessarily be in writing, and made within the original period of limitation nor any such acknowledgment has been pleaded in the plaint or placed on the record. Besides, no case for the exemption etc. has been set-forth in the plaint and the requisite grounds are conspicuously missing in this behalf as is mandated by Order VII, Rule 6, C.P.C. "

As per the decision of the Supreme Court of Pakistan, there are two entirely separate basis for determining the period of limitation in a *lis* seeking the specific performance of an agreement. Where a specific date is specified for performance in the agreement, then subject to any modification to that

date for performance as may be agreed between the parties, that date will be the basis for determining the date from which the period limitation will be calculated. In the alternative, if no date is specified in the agreement on which performance of the obligations are to determine, the limitation will accrue from the date when performance of the obligation is “refused”.

17. The criteria applied by the II<sup>nd</sup> Senior Civil Judge Karachi (East) in Civil Suit No.1089 of 2019 that the date from which the period limitation will be calculated limitation should be the date when the Appellant had performed his obligation under the agreement and the criteria adopted by the IX Additional District & Sessions Judge (MCAC) Karachi (East) in Civil Appeal No.135 of 2020 that on the basis of the averments of the Respondent in his written statement as the agreement of sale should have been performed in January 2011 are both clearly incorrect. The criteria to be applied, as held by the Supreme Court of Pakistan, is to commence from either a specified date that has been mentioned in the oral agreement of sale for performance and in the event that no date is specified then limitation is to be calculated from the date when the Respondent refused to perform his obligations under the oral agreement of sale. Regrettably, both the II<sup>nd</sup> Senior Civil Judge Karachi (East) in Civil Suit No.1089 of 2019 and the IX Additional District & Sessions Judge (MCAC) Karachi (East) in Civil Appeal No.135 of 2020 have not applied the correct criteria in this regard. Firstly, the Appellant in the Civil Suit No. 1089 of 2019 has not indicated any date on which performance of the agreement to sale was to be calculated rather in paragraph 6 of the Plaint he has indicated that the Respondent is not willing to perform his obligations under the oral agreement of sale and as such has maintained the *lis*. This would mean that as there was, as according to the Appellant, no specific date for performance of the oral agreement of sale, the date from when limitation should be calculated under



Article 113 of the First Schedule of the Limitation Act, 1908 should therefore be the date from when the Respondent refused to perform his obligations. The reliance of the IX Additional District & Sessions Judge (MCAC) Karachi (East) in Civil Appeal No.135 of 2020 on the Written Statement of the Respondent in Civil Suit No. 1089 of 2019 wherein it was stated that the obligations were to be performed on a date in 2011, being in effect a denial of the averments of the plaint, as per the decision of the Supreme Court of Pakistan in **Haji Abdul Karim vs. Messrs Florida Builders (Private) Limited**<sup>16</sup> could not have been looked into. Similarly, the decision of IIInd Senior Civil Judge Karachi (East) in Civil Suit No.1089 of 2019 that the time period for the calculation of the period of limitation should be from the date when the Appellant had completed the performance of his obligations under the oral Agreement of Sale is also incorrect. In the absence of a precise date for performance of the Agreement of Sale as indicated in the plaint of Civil Suit No.1089 of 2019, a court should have calculated limitation under Article 113 of the First Schedule of the Limitation Act, 1908 from the date when performance was refused by the Respondent.

18. It is to be noted that in paragraph 9 of the written statement the Respondent **admits** that he had sent a legal notice to the Appellant and wherein *inter alia* it was stated as under:

- “ ...
6. On 1.1.2014 you had made a payment of Rs.27,30,000 stating to be an advance towards the sale of the said property with final price of the said property to be the prevalent market price, at the time of making the final payment.
7. Today the market price of the said property is Rs.15 million and if Rs 27,30,000/- is deducted there-from this would leave the balance payment to be at Rs.1,22,70,000/-. We give you 14 days notice to make the balance payment of Rs.1,22,70,000/-, failing which our client also gives you notice to intimate the details of your bank account so that the refund of Rs.27,00,000/- could be made to you immediately. In case you do not make the balance payment of Rs.1,22,70,000/- within 14 days and also do not come forward to collect Rs.27,30,000/- the latter amount shall stand forfeited without any further notice.

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<sup>16</sup> PLD 2012 SC 247

8. *Also if you do not agree that the current market price of the said property is Rs.15 million, no agreement of sale could be construed because for any contract to take place, the parties must converge on the terms and conditions. Without prejudice to the latter, no agreement of sale could be construed to have ever taken place because of the terms being contingent. If you agree that the present market price of the said property is Rs.15 million and still do not make the balance payment of Rs.122,70,000/-, the sale agreement, if any, would stand cancelled without any further notice upon the expiry of 14 days from today."*

On the basis of this legal notice, it would therefore seem to be common ground that there was an oral agreement of sale as between the Appellant and the Respondent for the purchase by the Appellant of the Said Property. It is however in dispute as to value of the sale consideration that has passed from the Appellant to the Respondent is in dispute. From the legal notice dated 12 May 2018, it is also apparent that the Respondent, for whatever reason, reneged on his obligation under the oral agreement to sell the Said Property to the Appellant for a sum of Rs.5,500,000 (Rupees Five Million Five Hundred Thousand) and has now demanded a sum of Rs.15,000,000 (Rupees Fifteen Million) to be paid within fourteen days from the date of the notice failing which the sale consideration of Rs.2,730,000 (Rupees Two Million Seven Hundred and Thirty Thousand), which admittedly had been paid by the Appellant to the Respondent, would be forfeited. To my mind once an agreement to sell has been admitted by the Respondent and various terms of that oral agreement are unilaterally modified by the Respondent, the same would amount to the respondent **refusing** to perform his obligations on that oral agreement of sale and which would give the Appellant a right to maintain a *lis* for specific performance. The date of the legal notice was 12 May 2018, the time period for institution of the *lis* should be determined from that date and having been presented 6 May 2019 was within the time period specified in Article 113 of the First Schedule of the Limitation Act, 1908 and which, subject to evidence to the contrary of any other issue of limitation, was maintainable before the II<sup>nd</sup> Senior Civil Judge Karachi (East).

20. I am of the opinion that there is a material irregularity in the Judgement dated 25 November 2021 and the Decree dated 27 November 2021 passed by the IXth Additional District Judge Karachi (East) in Civil Appeal No.135 of 2020 and in the Order dated 7 September 2020 passed by the IInd Senior Civil Judge Karachi (East) who have both failed to apply the law in respect of the application of order VII Rule 11 of the Code of Civil Procedure 1908 properly and for the foregoing reasons, I am inclined to revise the Judgement dated 25 November 2021 and the Decree dated 27 November 2021 passed by the IXth Additional District Judge Karachi (East) in Civil Appeal No.135 of 2020 and the Order dated 7 September 2020 passed by the IInd Senior Civil Judge Karachi (East) each of which are set-aside and order that the Application under Order VII Rule 11 of the Code of Civil Procedure, 1908 maintained by the Respondent in Civil Suit No.1089 of 2019 is dismissed. This Application under section 115 of the Code of Civil Procedure 1908 is therefore allowed and the matter is remanded to the court of the IInd Senior Civil Judge Karachi (East) to adjudicate Civil Suit No.1089 of 2019 on merits, with no order as to costs.

JUDGE

Dated: 25 July 2023

Nasir P.S.